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Index Continent Sdn Bhd v Bar Malaysia

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO
W-02(NCVC)(W)-475-02 OF 2012
MOHD HISHAMUDIN, ZAHARAH IBRAHIM AND AZAHAR
MOHAMAD JJCA
31 JULY 2013

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Legal Profession — Malaysian Bar — Powers — Malaysian Bar obtained injunction to prevent company carrying on business to link members of public having legal queries with lawyers who could answer them — Injunction based on company's alleged breach of s 37 of the Legal Profession Act 1976 ('the LPA')

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— Whether breach of s 37 penal in nature — Whether action for infringement of s 37 within sole purview of attorney general as public prosecutor and not for Malaysian Bar to enforce by way of civil proceedings — Whether Malaysian Bar's powers to take legal action limited to matters 'concerning the affairs of the Malaysian Bar' — Section 57(j) of the LPA — Whether Malaysian Bar did not have substantive locus standi to apply for injunction against company

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The appellant had started a business to allow members of the public seeking legal assistance to contact lawyers who could answer their specific queries or provide assistance ('the service'). The appellant made it clear in its

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advertisements that it was not itself providing any legal service. Taking the view that the service contravened s 37 of the Legal Profession Act 1976 ('the LPA') and that it had a duty under the LPA to protect public interest, the respondent obtained an injunction from the High Court to prevent the appellant from carrying on with the service. Section 37(3) of the LPA, in particular, made it an

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offence for any unauthorised person to offer or agree to place at the disposal of any other person the services of an advocate and solicitor unless the act was done pursuant to a lawful contract of indemnity or insurance. In the High Court, the appellant contended, inter alia, that as the act sought to be restrained by the injunction was a criminal one, the respondent did not have

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substantive locus standi to commence the suit as any action for infringement of s 37 was solely within the domain of the attorney-general ('the AG') under art 145 of the Federal Constitution. It was contended that the respondent should have referred the matter to the AG and not have acted ultra vires the LPA by seeking to enforce a penal sanction by way of civil proceedings. The

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High Court held that since one of the purposes of the respondent's establishment was 'to protect and assist the public in all matters touching ancillary or incidental to the law' (as provided under s 42(1)(g) of the LPA), the respondent did have locus standi to commence the suit for 'the benefit and protection of an unsuspecting public'. The High Court also held that even

though s 37 of the LPA provided for criminal sanctions, the respondent had not usurped the AG's powers in filing the action as it was not a criminal prosecution but an action brought upon the respondent's belief that it was necessary to protect the public from being adversely affected by the service. The main issue in the instant appeal against the High Court's decision was whether the respondent had substantive locus standi to apply for the injunction.

Held, allowing the appeal with costs:

- (1) The respondent did not have substantive locus standi to have applied for the injunction. Reading ss 41(2) and 42(2) of the LPA together with s 57, especially s 57(j), the respondent's powers to institute legal proceedings (through the Bar Council) was limited to matters 'concerning the affairs of the Malaysian Bar'. As an infringement of s 37 was penal in nature, such infringement was within the sole purview of the attorney general as the public prosecutor. It was not part of the affairs of the respondent (see paras 30–33).
- (2) Section 41(2) and para (e) of s 42(2) of the LPA at first blush seemed to grant the respondent power to apply for injunction. However, ss 41(2) and 42(2) had to be read together with the rest of the LPA. Being a body corporate, the respondent had to act through a functionary/representative and that was the Bar Council. The specific powers of the Bar Council were set out in s 57 of the LPA and under para (j) it only had power 'to institute, conduct, defend, compound or abandon any legal proceedings by and against the Malaysian Bar ... concerning the affairs of the Malaysian Bar ...' (see paras 25–27 & 29).

[Bahasa Malaysia summary]

Perayu memulakan perniagaan untuk membenarkan orang awam memohon bantuan undang-undang untuk berhubung dengan peguam-peguam yang boleh menjawab soalan spesifik mereka atau memberikan bantuan ('khidmat'). Perayu membuat dengan jelas di dalam iklannya bahawa ia tidak dengan sendirinya memberikan apa-apa khidmat perundangan. Mengambil kira bahawa khidmat bertentangan s 37 Akta Profesion Undang-Undang 1976 ('APU') dan bahawa ia mempunyai tugas di bawah APU untuk melindungi kepentingan awam, responden memperoleh injunksi daripada Mahkamah Tinggi untuk menghalang perayu daripada menjalankan khidmat tersebut. Seksyen 37(3) APU, terutamanya, membuatnya kesalahan untuk mana-mana orang yang tanpa kebenaran untuk menawarkan atau bersetuju memberikan untuk kegunaan orang lain khidmat peguambela dan peguamcara kecuali tindakan dibuat berikutan kontrak sah indemniti atau insurans. Di Mahkamah Tinggi perayu berhujah, antara lain, bahawa oleh kerana tindakan yang dipohon untuk dihalang oleh injunksi adalah satu tindakan jenayah, responden tidak mempunyai *locus standi* substantif untuk memulakan tindakan sebagai apa-apa tindakan untuk pelanggaran s 37 adalah

- A semata-mata dalam skop Peguam Negara ('PN') di bawah perkara 145 Perlembagaan Persekutuan. Ia diujahkan bahawa responden sepatutnya merujuk perkara kepada PN dan bukan bertindak *ultra vires* APU dengan memohon untuk menguatkuasakan sanksi hukuman melalui prosiding sivil. Mahkamah Tinggi memutuskan bahawa memandangkan salah satu tujuan
- B penubuhan responden adalah untuk 'to protect and assist the public in all matters touching ancillary or incidental to the law' (seperti yang diperuntukkan di bawah s 42(1)(g) APU), responden tidak mempunyai *locus standi* untuk memulakan tindakan untuk 'the benefit and protection of an unsuspecting public'. Mahkamah Tinggi juga memutuskan bahawa walaupun
- C s 37 APU memperuntukkan untuk sanksi jenayah, responden tidak merampas kuasa PN dalam memfailkan tindakan kerana ia bukan pendakwaan jenayah tetapi tindakan yang dibawa atas kepercayaan responden bahawa ia perlu melindungi pihak awam daripada terjejas dengan teruk oleh khidmat tersebut. Isu utama dalam rayuan ini terhadap keputusan Mahkamah Tinggi adalah
- D sama ada responden mempunyai locus standi substantif untuk memohon injunksi.

Diputuskan, membenarkan rayuan dengan kos:

- E (1) Responden tidak mempunyai *locus standi* substantif untuk memohon injunksi. Membaca ss 41(2) dan 42(2) APU bersama dengan s 57, terutamanya s 57(j), kuasa responden untuk memulakan prosiding undang-undang (melalui Majlis Peguam) terhad kepada perkara
- F 'concerning the affairs of the Malaysian Bar'. Memandangkan pelanggaran s 37 bersifat hukuman, pelanggaran sedemikian adalah dalam satu-satunya skop Peguam Negara sebagai pendakwa raya. Ia bukan sebahagian hal ehwal responden (lihat perenggan 30–33).
- G (2) Seksyen 41(2) dan perenggan (e) s 42(2) APU sepintas lalu seolah-olah memberikan responden kuasa untuk memohon injunksi. Walau bagaimanapun, ss 41(2) dan 42(2) mesti dibaca bersama dengan kesemua APU. Sebagai badan korporat, responden mesti bertindak melalui wakil dan itu adalah Majlis Peguam. Kuasa spesifik Majlis Peguam adalah ditetapkan di dalam s 57 APU dan di bawah perenggan (j) ia hanya mempunyai kuasa 'to institute, conduct, defend, compound or
- H abandon any legal proceedings by and against the Malaysian Bar ... concerning the affairs of the Malaysian Bar ...' (lihat perenggan 25–27 & 29).]

Notes

- I For a case on powers, see 9 *Mallal's Digest* (4th Ed, 2012 Reissue) para 1655.

Cases referred to

American Cyanamid Co v Ethicon Ltd [1975] 1 All ER 504; [1975] AC 396, HL (refd)

Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors [1995] 1 MLJ 193; [1995] 1 CLJ 293, CA (not folld) A

Legislation referred to

Companies Act 1965
Federal Constitution art 145 B
Legal Profession Act 1976 ss 37, 37(3), 41, 41(2), 42, 42(1), 42(2), 42(2)(a), (b), (c), (d), (e), 43(3), 47, 56, 57, 57(j)

Appeal from: Suit No D2–22NCVC-1000–10 of 2011 (High Court, Kuala Lumpur) C

Mahathir Abdullah (Adlan Hadi bin Mohamed Yusof with him) (Raslan Loong) for the appellant.
Trevor George (Izalia Zainuddin with him) (Trevor George Partnership) for the respondent. D

Zaharah Ibrahim JCA (delivering judgment of the court):

BACKGROUND FACTS E

- [1] The appellant is a private limited company incorporated under the Companies Act 1965.
- [2] The respondent is a body corporate established by the Legal Profession Act 1976 ('the LPA'). F
- [3] The appellant wishes to launch a service to members of the public who are seeking legal assistance by providing information on law firms providing such assistance, and connecting the requesting party to the appropriate law firms ('the impugned service'). G
- [4] To that end, the appellant has been approaching several legal firms to inquire about their services and the terms of the services. The appellant has also advertised the impugned service on the internet and by e-mail, but has made it clear that it does not itself provide any legal service. H
- [5] The respondent, having taken the view that the appellant's acts contravene the LPA, sought and obtained from the High Court an interlocutory and *quia timet* injunction against the appellant on the ground that it has a duty to protect public interest. I
- [6] The appeal before us is against the order granting such injunction.

A HIGH COURT DECISION*Substantive locus standi*

B [7] In the High Court, apart from the issue of whether the usual tests as propounded in *American Cyanamid Co v Ethicon Ltd* [1975] 1 All ER 504; [1975] AC 396, and developed further in *Keet Gerald Francis Noel John v Mohd Noorbin Abdullah & Ors* [1995] 1 MLJ 193; [1995] 1 CLJ 293 ('*Keet Gerald tests*'), had been met, the appellant had raised the issue of whether the respondent had the substantive locus standi to commence this action against the appellant.

D [8] The appellant submitted that the respondent lacked the necessary substantive locus standi in view of the fact that the act sought to be restrained by the injunction constitutes a criminal act which only the attorney general, under art 145 of the Federal Constitution, has the power to deal with by way of prosecution.

E [9] The learned High Court judge found that the respondent had substantive locus standi as the LPA had provided for the Malaysian Bar, in s 42, extensive objects and powers to commence the action and apply for the injunction.

F [10] The learned High Court judge held that the purpose in para 42(1)(g) of the LPA was of particular relevance and would clothe the respondent with locus standi to bring this action for 'the benefit and protection of an unsuspecting public'. That paragraph reads as follows:

G (g) to protect and assist the public in all matters touching ancillary or incidental to the law.

H [11] The learned High Court judge was of the view that the respondent was not usurping the powers of the attorney general in filing this action, as this was not a criminal prosecution, but an action brought due to the respondent's belief that the action was necessary to protect the public in relation to the impugned service, which clearly fell within the phrase 'matters touching ancillary or incidental to the law'.

I *Keet Gerald tests*

[12] On the *Keet Gerald* tests, the learned High Court judge found that:

- (a) there was a bona fide issue to be tried, namely whether the impugned service was caught by sub-s 37(3) of the LPA;

- (b) the balance of convenience lay in the respondent's favour as an 'untold number of unsuspecting and gullible' members of the public would be taken in and be adversely affected as opposed to the financial loss and loss of goodwill that the appellant would suffer if the injunction was granted; and A
- (c) damages would not be adequate remedy as 'if left unchecked' the impugned service 'may well lead to dire consequences'. B

ISSUES DURING THE APPEAL

- [13] The issue of substantive locus standi is the main issue before us during the hearing of this appeal. C
- [14] Encik Mahathir Abdullah, learned counsel for the appellant, submitted that civil proceedings cannot be invoked to prevent what is essentially a criminal act. The provision of the impugned service if it contravenes s 37 of the LPA would be a criminal offence. The respondent should have referred the matter to the attorney general. D
- [15] Encik Mahathir contended that the respondent is acting ultra vires the LPA in applying for the injunction. E
- [16] Encik Trevor George, learned counsel for the respondent, submitted that in raising the issue of locus standi, the appellant is actually saying that the learned High Court judge must decide on the merits. At the interlocutory injunction stage, all the respondent needs to show is that the *Keet Gerald* tests have been satisfied. F
- [17] If the respondent has no locus standi, according to Encik Trevor George, the appellant should have applied to strike out the suit. G

ANALYSIS OF ISSUE

- [18] It is not in dispute that the appellant's act that the respondent seeks to restrain is the provision of the impugned service. The respondent says that such act contravenes s 37 of the LPA and by virtue of the respondent's objects and powers as set out in s 42 of the LPA, in particular para 42(1)(g), it is duty bound to apply for the injunction to restrain the appellant from continuing with such act. H
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A [19] We agree with the learned High Court judge that whether or not the appellant's impugned service is an act prohibited by s 37, in particular sub-s 37(3) of the LPA, is a matter that needs to be determined during the trial, not at the interim injunction stage.

B [20] Our concern is simply whether the respondent has the substantive locus standi to apply for the injunction.

C [21] To understand the scope of the objects and powers of the respondent, it is useful to set out in full the provisions of ss 41–42 of the LPA. They read as follows:

Establishment of Malaysian Bar

41(1) There is established a body corporate to be called the 'Malaysian Bar'.

D (2) The Malaysian Bar shall be a body corporate with perpetual succession and a common seal, and with power subject to this Act to sue and be sued in its corporate name and to acquire and dispose of property both movable and immovable and to do and perform such other acts as bodies corporate may by law perform.

E Object and powers of the Bar

42(1) The purpose of the Malaysian Bar shall be —

- F** (a) to uphold the cause of justice without regard to its own interests or that of its members, uninfluenced by fear or favour;
- (b) to maintain and improve the standards of conduct and learning of the legal profession in Malaysia;
- (c) to facilitate the acquisition of legal knowledge by members of the legal profession and others;
- G** (d) where requested so to do, to express its view on matters affecting legislation and the administration and practice of the law in Malaysia;
- (e) to represent, protect and assist members or of the legal profession in Malaysia and to promote in any proper manner the interests of the legal profession in Malaysia;
- H** (f) to establish libraries and to acquire or rent premises to house the libraries and offices of the Malaysian Bar or amenities for the use of members either alone or in conjunction with any other body or society;
- I** (g) to protect and assist the public in all matters touching ancillary or incidental to the law;
- (h) to make provision for or assist in the promotion of a scheme whereby

- impecunious persons may be represented by advocates and solicitors; **A**
- (i) to award prizes and scholarships and to establish and subsidise lecturership in educational institutions in subjects of study relating to law; **B**
- (j) to grant pecuniary or other assistance to any association, institute, board or society in Malaysia in the interest of the legal profession or of the law students; **C**
- (k) to afford pecuniary and other assistance to members or former members of the Malaysian Bar and to the wives, widows, children and other dependants, whether of members, former members or deceased members who are in need of any such assistance; **D**
- (l) to promote good relations and social intercourse amongst members and between members and other persons concerned in the administration of law and justice in Malaysia; **E**
- (m) to encourage, establish and maintain good relations with professional bodies of the legal profession in other countries and to participate in the activities of any local or international association and become a member thereof; and **F**
- (n) to establish a Compensation Fund. **G**
- (2) In addition to any other powers given by this Act, the Malaysian Bar may —
- (a) purchase or lease any land or building required for any of the purpose of the Malaysian Bar; **H**
- (b) sell, surrender, grant, lease, exchange or alter any land or building as may be found most convenient or advantageous; **I**
- (c) borrow money whether by way of bank overdraft or otherwise for such of the purposes of the Malaysian Bar as the Malaysian Bar may from time to time consider desirable; **J**
- (d) make rules governing the manner of convening general meetings of the Malaysian Bar and the procedure thereat which rules shall be approved and may be amended by ordinary resolution at a general meeting of the Malaysian Bar; and **K**
- (e) do all such other things as are incidental or conducive to the achievement or betterment of the purposes of the Malaysian Bar. **L**
- (3) In addition to any other rules that it may make under this Act the Malaysian Bar may make rules for giving effect to this Part. **M**

[22] The specific power in sub-s 41(2) of the LPA for the respondent to sue and be sued in its corporate name comes with the qualification that it is 'subject to this Act'.

- A [23] The matters listed in sub-s 42(1) are not powers of the respondent but are the objects for its establishment. Its powers are as set out in sub-ss 41(2), 42(2) and 43(3) of the LPA.
- B [24] The powers in paras (a)–(d) of sub-s 42(2) do not enable the respondent to institute this action to restrain the appellant from providing the impugned service.
- C [25] Subsection 41(2) and para (e) of sub-s 42(2) at first blush seem to grant the respondent the power to make the application for injunction against the appellant.
- D [26] However, the provisions of sub-ss 41(2) and 42(2) must be read together with the rest of the LPA.
- E [27] It must be borne in mind that the respondent being a body corporate must necessarily act through some functionary or representative. That functionary/representative is the Bar Council which is established under s 47 of the LPA for the specific purpose of ‘the proper management of the affairs of the Malaysian Bar and for the proper performance of its functions under this Act’.
- F [28] Under s 56 of the LPA, the management and funds of the respondent are vested in the Bar Council.
- G [29] Section 57 of the LPA, sets out the specific powers of the Bar Council of special relevance to the issue of substantive locus standi before us is para 57(j), which reads as follows:
- (j) to institute, conduct, defend, compound or abandon any legal proceedings *by and against the Malaysian Bar* or its officers or otherwise *concerning the affairs of the Malaysian Bar* and to compound and allow time for payment or satisfaction of any debts due or of any claims or demands made by or against the Malaysian Bar.
(Emphasis added.)
- H [30] In our view, the powers of the respondent in sub-ss 41(2) and 42(2) of the LPA must be read together with the powers of the Bar Council in s 57. When that is done, it will be apparent that the powers of the respondent to institute legal proceedings (through the Bar Council) are limited to matters
- I ‘concerning the affairs of the Malaysian Bar’.
- [31] Is the possible infringement of s 37 of the LPA part of the affairs of the Malaysian Bar (the respondent)?

[32] As any infringement of s 37 is penal in nature, we agree with the appellant that such infringement is within the sole purview of the attorney general as public prosecutor. It is not part of the affairs of the respondent. A

[33] We are therefore of the considered view that the respondent does not have the substantive locus standi to apply for the injunction which is the subject matter of this appeal. B

[34] Based on our analysis and conclusion as set out above, we do not think it necessary to deal with the *Keet Gerald* tests. C

DECISION

[35] We therefore allow this appeal and we set aside the order of the High Court. We also order that costs in the sum of RM10,000 be paid to the appellant. D

Appeal allowed with costs.

Reported by Ashok Kumar E

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